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NO. 09-253

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HECTOR ADAMES, JR., *ET AL.*,
Petitioners,

v.

BERETTA USA CORPORATION, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Beretta's response in opposition is an exercise in misdirection. First, Respondents ask the Court to ignore the important federalism issue presented to the Court because an exception in the statute at issue does not apply to the facts in this case. In so doing, Respondents fail to respond to Petitioners' argument that the statute as a whole raises serious and important federalism concerns of national importance and that the federalism issue worthy of this Court's attention is exemplified by that exception, which does not apply to this case simply because Illinois has chosen to have its judiciary, not its legislature, establish its product liability standards. Respondents are wrong in suggesting that Petitoners' federalism issue was not raised below. Petitioners raised it, and the Illinois Supreme Court addressed it. It is properly before this Court for its review.

Second, Respondents gloss over the split in the circuits about the proper standard to apply to Tenth Amendment challenges by labeling some circuits as merely "wrong," as if that erases the circuit split. Respondents also argue that there can be no Tenth Amendment violation where Congress relies upon its Commerce Power. Respondents' unduly broad reading of the Commerce Power highlights the importance of the issues in this case because Respondents give deeply problematic short shrift to the federalist system embodied in our Constitution and overstate this Court's precedents. By doing so, Respondents make clear that the Court's guidance is needed to define the constitutional barriers against

federal intrusion into state law-making functions under the Tenth Amendment.

Finally, on the matter of statutory interpretation, Beretta does not deny that the legislative history indicates that the statute was intended to preserve product liability cases such as this and was actually directed at municipal public nuisance lawsuits, but Respondents argue the language of the statute plainly evinces an opposite meaning. However, Beretta fails to contest that the Illinois Supreme Court's ruling demonstrates that the Act's meaning is unclear at best and that resort to legislative history is needed to understand its terms and avoid a construction of the Act contrary to Congress's intent. The Illinois Supreme Court dismissed even the failure to warn claim by finding that the unintentional act of shooting death of Josh Adames was "volitional," a distinction that the statute does not settle and that legislative history properly informs. Thus, the construction of this federal statute, as well as its constitutionality, presents issues worthy of the exercise of this Court's discretion.

I. WHETHER THE PLCAA VIOLATES THE TENTH AMENDMENT IS AN ISSUE OF GREAT NATIONAL IMPORTANCE THAT WAS PRESENTED TO AND DECIDED BY THE ILLINOIS SUPREME COURT AND IS PROPERLY BEFORE THIS COURT

In the face of a circuit split on the proper analysis under the Tenth Amendment, Respondents choose to focus on one particular part of the statute in issue to divert this Court's attention from the question properly before it. The question presented

by the Petition is whether the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. § 7901, *et seq.*, violates the Tenth Amendment. The Petition details the split in the circuits in handling Tenth Amendment challenges and demonstrates the need for this Court's guidance. The proper handling of Tenth Amendment challenges is also an issue of great national importance that is certain to be repeated any time Congress purports to preempt only the States' common law but not its legislated law under the guise of its power under the Commerce Clause.

Contrary to Respondents' apparent claim,[1] federalism and the Tenth Amendment issue were raised by Petitioners below and were squarely addressed by the Illinois Supreme Court. Pet. App. 43a-45a. Petitioners challenged, and the Illinois Supreme Court ruled on, the constitutionality of the PLCAA. In their opening brief in the Illinois Supreme Court, Petitioners argued, just as they do here, that Section 7903(5)(A)(iii) crystallizes the Tenth Amendment violation by the PLCAA by dictating to the States which branch of their respective governments can make the law of the States that Congress is willing to recognize. Relying entirely on the Second Circuit's reasoning in *City of New York v. Beretta*, 524 F.3d 384 (2d Cir. 2008), and providing no separate reasoning of its own, the Illinois Supreme Court applied an unduly narrow Tenth Amendment standard in rejecting Petitioners' constitutional challenge. *Id.* at 45a.

The issue presented in the Petition was both pressed and passed upon in the Illinois Supreme

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[1] Br. in Opp. 8-9.

Court, and this Court may exercise jurisdiction over this matter under § 1257(a). It is of no moment that the Illinois Supreme Court did not, as Respondents point out, cite this specific subsection that demonstrates the Tenth Amendment violation in its opinion.[2] Nor is it relevant to Petitioners' Tenth Amendment challenge that this particular subsection does not apply in this case. After all, it is precisely the limited reach of the subsection, favoring legislative authorization of lawsuits over judicial authorization of the same cause of action, that comprises Congress's unconstitutional overreaching. Indeed, Beretta does not dispute that had the Illinois legislature codified its product liability and warning standards, the Act would have supported allowing Adames' claims, though identical in every way to the common law claims that were dismissed.

Essentially, Respondents wish this Court to view the PLCAA as something it is not: an Act that broadly preempts firearms liability cases, without distinguishing between those based on standards established by the judicial, as opposed to the legislative, branches of state governments. However, as Respondents themselves recognize, Section 7903(5)(A)(iii) is *evidence* of Congress's unconstitutional purpose in enacting the PLCAA. *See* Brief in Opp. 8. Regardless of whether Section

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[2] The Second Circuit opinion relied upon by the Illinois Supreme Court extensively discussed the subsection that is the lynchpin of what Petitioners submit is a blatant and serious Tenth Amendment violation. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390, 396-97 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 1579 (2009).

7903(5)(A)(iii) actually applies to the Petitioners' claims, it provides stark testimony of the unconstitutional purpose and impact of the law. Simply put, the unavailability of the exception creates the constitutional flaw. Thus, it is relevant to this Court's consideration of whether to grant the Petition, as well as the merits of Petitioners' Tenth Amendment arguments. Respondents would have the Court overlook this intrusion into state sovereignty because other subsections of the statute do not make the same intrusion. But Section 7903(5)(A)(iii) and the purposes and legislative history of the PLCAA make the entire statute constitutionally infirm. This issue is properly before the Court for its review.

II. RESPONDENTS' ATTEMPT TO GLOSS OVER THE EVIDENT CIRCUIT SPLIT IS UNAVAILING

While Respondents gloss over the split in the circuits about the proper standard to apply in Tenth Amendment challenges, the circuit split is clear and merits the Court's review.

By upholding the PLCAA as constitutional, the Illinois Supreme Court, like the Second Circuit before it, improperly narrowed the Tenth Amendment's protection of state sovereignty and, with it, each State's authority to lodge the lawmaking function in the branch or branches of its choice. To them, that issue is determined by a simplistic and uninformative inquiry into whether Congress has commandeered state executive or legislative branch officers by requiring them to undertake affirmative actions on behalf of the federal government. The court did not note or discuss the

broader scope given to the Tenth Amendment by this Court or by other courts of appeal.

As the Petition illustrates, there is a significant split in the lower courts regarding the proper analysis to apply in Tenth Amendment challenges. The First, Fourth, and Tenth Circuits all approach Tenth Amendment challenges by looking beyond the question of whether Congress had commandeered the states and inquire into whether the legislation effectively regulates the "states as states," thereby impermissibly invading core aspects of state sovereignty. *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir.), *cert. denied*, 522 U.S. 904 (1997); *United States v. Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997); *United States v. Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), *cert. denied*, 519 U.S. 1084 (1997).

Despite Respondents' assertion that the standard employed by these courts was overruled by this Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), all of these cases post-date the decision in *Garcia*, and the Court did not grant certiorari to review these circuit decisions when presented with petitions. Moreover, *Garcia's* reliance on the political process to protect state interests, *id.* at 552, is patently insufficient to protect States' "residuary and inviolable sovereignty." THE FEDERALIST No. 39, 285 (B. Wright ed. 1961) (J. Madison). It would not have, for example, protected Oklahoma's sovereign right to determine the location of its capital. *See Coyle v. Smith*, 221 U.S. 559 (1911). Thus, relying on *Coyle*, this Court has reiterated that despite "substantial powers" vested in Congress, "including in areas of intimate concern to the States, the Constitution has

never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

The standards applied by the circuits recognizing more to Our Federalism than an anti-commandeering mandate, as well as those employed by the Third and Fifth Circuits, are consistent with this Court's Tenth Amendment jurisprudence, which is *not* limited to looking at only whether a federal law "commandeers" state governments. The Tenth Amendment standard used by these courts conflicts with the standard used by the Illinois Supreme Court, which is the same standard applied by the Second, Seventh, and District of Columbia Circuits,[3] which limits the Tenth Amendment inquiry to the question of whether Congress has commandeered State officials.

Although it is also clear that using the standard employed by the First, Fourth, and Tenth Circuits, the PLCAA is an unconstitutional violation of the Tenth Amendment, Respondents try to gloss over the difference between the standards by asserting that these very different standards are "entirely consistent" with each other. *See* Opp. 13. Respondents' mere incantation of the words "entirely consistent" does not make it so. The PLCAA clearly fails the test employed by the First, Fourth and Tenth Circuits, as the Act infringes on states' authority to determine which branch of state government establishes liability standards to be applied by state courts, the determination of which are "attribute[s] of state sovereignty" that would

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[3] *See* Pet. 15-17.

"impair [a state's ability] 'to structure integral operations in areas of traditional governmental functions.'" *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288 (1981) (citation omitted).

The standard employed by the Illinois Supreme Court is inconsistent with this test. Not only did the Illinois Supreme Court not attempt to apply the standard applied in these other courts, it did not even acknowledge that the standard exists or that it is countenanced by this Court's jurisprudence. Instead, it applied a test under which the only way Congress can violate the Tenth Amendment is by enacting a law that commandeers the states' executive officials or legislative processes. The Illinois Supreme Court did not inquire into whether the PLCAA impermissibly intrudes upon key elements of state sovereignty, such as the division of state law-making authority.

The clear conflict between the Illinois Supreme Court's decision, as well as decisions of the Second, Seventh, and District of Columbia Circuits, with decisions of the First, Fourth, Fifth, and Tenth Circuits strongly suggest the need for resolution by this Court.

III. THE UNDULY BROAD READING OF THE COMMERCE CLAUSE AND UNDULY NARROW READING OF THE TENTH AMENDMENT BY THE ILLINOIS SUPREME COURT AND THE RESPONDENTS ILLUSTRATE WHY REVIEW IS WARRANTED

The primary thrust of Respondents' argument on the merits of the important Tenth Amendment question before the Court can be boiled down to one broad statement regarding the sweep of the Commerce Clause: "Since the Commerce Clause authorized Congress to enact the PLCAA, the Tenth Amendment is therefore not implicated." Opp. 12 (quotation and citation omitted). This statement underscores the inadequacy of an approach to Federalism that ignores the reach and content of the law Congress has enacted. Even if legitimate exercise of the Commerce Power often forecloses any Tenth Amendment claim, the substance of the law can arrogate to Congress power it does not have.

This Court recognized precisely the limits of such a test in *RAV v. City of St. Paul*, 505 U.S. 377 (1992). Although some areas of speech fall outside the First Amendment's ambit and protection because of "constitutionally proscribable content (obscenity, defamation, etc.)," the government may not exercise that power by engaging in content discrimination. *Id.* at 383. Thus, for example, "government may proscribe libel, but it may not make the further content discrimination of proscribing only libel critical of the government." *Id.* at 384. As this Court concluded in the First Amendment area, "[s]uch a simplistic, all-or-nothing-at-all approach to First

Amendment protection is at odds with common sense and with our jurisprudence as well." *Id.*

The same conclusion about a "simplistic, all-or-nothing-at-all approach" could be drawn about the federalism inquiry that the Illinois Supreme Court employed and Respondents urge here. After all, all Tenth Amendment challenges necessarily call into question the validity of the exercise of Congressional power. For instance, when the Fourth Circuit upheld the Child Support Recovery Act ("CSRA"), 18 U.S.C. § 228 (2000), it explained that a Tenth Amendment challenge to a federal statute involves *two* questions: (1) whether the law falls within the enumerated powers of Congress; and (2) whether the means of regulation employed impermissibly infringes upon state sovereignty. *United States v. Johnson*, 114 F.3d at 480 (citing *New York*, 505 U.S. at 159, 188). *Cf. Peel v. Florida Dep't of Transp.*, 600 F.2d 1070, 1083 (5th Cir. 1979) ("In determining whether the congressional action violates the limitations of the tenth amendment, we must assess and weigh the source of the congressional power and the legitimacy of its exercise against the degree to which it interferes with integral governmental functions of the states and political subdivisions."). Respondents, like the Illinois Supreme Court, would have this Court do away with the second part of the analysis altogether.

Respondents' view of the Commerce Clause is overbroad. In their view, once the Commerce Clause is invoked, there can never be a federalism dispute. However, this approach takes the Commerce Clause too far. If, in Justice Kennedy's words, federalism represents the Framers attempt to "split the atom of sovereignty," *U.S. Term Limits, Inc. v. Thornton*, 514

U.S. 779, 838 (1995) (Kennedy, J., concurring), a jurisprudence that relies on the political sensibilities of Congress or a simple anti-commandeering test, will re-fuse the atom of sovereignty, throwing the Framers' accomplishment into the dustbin of history. It will lodge a virtually unlimited power of Congress to regulate state government under the unlimited guise of interstate commerce. This Court's jurisprudence reveals, however, that the Respondents' position is severely flawed.

Respondents' position assumes a positive answer to the first question in the Tenth Amendment inquiry laid out by several circuits and by this Court "ends the analysis." Opp. 12. Yet, as this Court has recognized, the fact that Congress exercised its powers under the Commerce Clause "does not conclusively resolve the constitutionality of the [statute]." *Reno v. Condon*, 528 U.S. 141, 149 (2000). Reviewing earlier decisions, the *Reno* Court said that this Court held various federal statutes invalid, "*not* because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment." *Id.* (emphasis added).

Even in the cases cited by Respondents, in a Tenth Amendment challenge, the Court *begins* with the question of whether Congress validly exercised one of its enumerated powers. *See McConnell v. Federal Election Commission*, 540 U.S. 93, 186-87 (2003); *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007). By challenging the constitutionality of the PLCAA under the Tenth Amendment, Petitioners put the validity of the congressional exercise of its Commerce Power at issue, as this is the first part of

the Tenth Amendment analysis. *Johnson*, 114 F.3d at 480; *Bongiorno*, 106 F.3d at 1033; *Hampshire*, 95 F.3d at 1004. The validity of the congressional action is always implicated in a Tenth Amendment challenge.

As Petitioners demonstrated in their Petition, the PLCAA is not standard economic regulation under the Commerce Clause in which Congress defines legal duties regarding some aspect of interstate commerce and sweeps aside state regulation in the field. *See FERC v. Regulatory Comm'n*, 456 U.S. 742, 759 (1982). Instead, Congress's purpose in enacting the PLCAA was to prevent a "maverick judge or petit jury" from imposing civil liability against a firearms manufacturer, dealer, or importer, without prior legislative approval. This does not qualify as "commerce," as this Court has defined it. *See United States v. Lopez*, 514 US 549, 558-59 (1995). State courts are neither channels nor instrumentalities of interstate commerce. Rather, they are governmental bodies that adjudicate the law. Even if courts could be instrumentalities of commerce, the distinction between judicial action, which Congress disapproved of, and legislative action, which Congress approved of, cannot be the basis of a constitutionally valid distinction.

However Congress may achieve its commercial goals, it may not do so by interfering with the States' choices about which branch of their government can authoritatively declare its law. As Justice Kennedy observed:

> Were the Federal Government to take over the regulation of entire

> areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory. The resultant inability to hold either branch of the government answerable to the citizens is more dangerous even than devolving too much authority to the remote central power.

Lopez, 514 U.S. at 577 (Kennedy, J. concurring) (citations omitted).

This Court has frequently taken responsibility to review congressional attempts to alter the federal balance of power, even where it has exercised one of its enumerated powers. Where, as here, Congress attempts to extend the reach of its power under the Commerce Clause to any activity that has a commercial origin or consequence, the Court "must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern." *Id.* at 580. Respondents would do away with that inquiry.

Under the second part of the Tenth Amendment inquiry, it is clear that Congress intended to intrude upon an area of traditional state governance—the way state courts make state law. Although Respondents contend that it was a proper exercise of the Commerce Power and is simply a standard variety federal law that preempts state

law, it is not. Under the PLCAA, states retain their discretion to define the legal duties of firearms dealers and manufacturers and create causes of action for breaching those duties. However, Congress directed that this state authority must be exercised through statutes "applicable to the sale or marketing" of firearms, rather than more generally or through judicial construction of statutes or the common law equally "applicable to the sale or marketing" of firearms. 15 U.S.C. § 7903(5)(A)(iii). Thus, Congress evinced no intention to preempt state law; passage of a statute reclaims the authority for the state. Instead, Congress only sought to displace state judicial authority. That power, however, is "reserved by the Constitution to the several States." *Erie R. Co. v. Tomkins*, 304 U.S. 64, 80 (1938).

As Petitioners maintained below, the issue is not whether Congress has the power to preempt state common law, but whether it impermissibly sought to limit the liability of gun manufacturers by dictating to the States that only their legislative branches, and not their courts, can create the law of liability. Respondents' broad reading of the Commerce Clause imbues the Commerce Power with such authority that it has no limits. Their argument regarding the reach of the Commerce Clause only highlights the importance of the issue presented to the Court for review.

IV. CONGRESS EXPRESSED NO INTENT TO PREEMPT TRADITIONAL PRODUCT LIABILITY ACTIONS

Respondents cannot effectively dispute that the PLCAA was clearly intended to preserve, not prohibit, product liability cases such as this. Beretta

cannot contest the clear expressions of legislative intent that the PLCCA was enacted to end municipal public nuisance lawsuits against gun manufacturers and distributors, a form of liability that Congress found to be "without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7). Congress further exempted most product liability actions from the sweep of the PLCCA's immunity provisions, including actions "for death, physical injuries or property damage resulting directly from a defect in design . . . when used as intended or in a reasonably foreseeable manner." 15 U.S.C. § 7903(5)(A)(v).

Instead, Respondents argue that this statutory language, as well as the legislative history, should be ignored, and the Act should be read to bar cases Congress assertedly wished to preserve. Beretta argues that the meaning of the products liability exemption for "a volitional act that constituted a criminal offense," *id.*, is in no way ambiguous, but plainly bars this case where, as a result of Beretta's defective design, 13-year-old Billy Swann believed his father's Beretta handgun was unloaded, and then pulled the trigger, unintentionally—and fatally—shooting his friend, Josh Adames.

Beretta does not dispute that a feasible safety device would have prevented Josh Adames's death or that Beretta's failure to warn owners of risks could support liability under traditional Illinois products law. Nor does Beretta dispute that this lawsuit would not have been dismissed under the PLCAA, if the Illinois's legislature had enacted a statute specifically applying Illinois products liability law to

the sale and marketing of firearms. It merely insists that a plain reading of the statute gives it complete immunity.

However, Beretta can point to no evidence that Congress intended to provide victims of such preventable shootings with no remedy against manufacturers, such as Beretta, who could have easily prevented them and would otherwise be liable under longstanding state tort law. Indeed, there is no dispute that Congress intended precisely the opposite: to preserve such claims. Nor is there any evidence of congressional intent to relieve Beretta of responsibility for outfitting the gun with a safety mechanism invented more than 100 years ago to prevent the unintentional discharge of a cartridge.

The Illinois Supreme Court strained to make Billy's act of pulling the trigger the type of "volitional act that constituted a criminal offense," *see* Pet. App.42a-43a, highlighting that the meaning of "volitional" is not sufficiently clear to have courts ignore the Act's purposes and findings, and Congress's legislative intent. The question presented on this issue of statutory construction is whether Congress contemplated providing a gun manufacturer with immunity for failing to include such a safety mechanism that would have prevented tragic events like this one, which are all too common.

Respondents urge a plain-language approach to statutory construction, Opp. 19-20. Yet, the Illinois Supreme Court found that language less than transparent, consulting both Black's Law Dictionary and Webster's Third New International Dictionary to divine the meaning of "volitional." Where it departed from the appellate court it reversed and Petitioners

was whether the act of volition was the shooting (which was clearly unintended) or an intent to pull the gun's trigger (of a gun whose defective design led Billy to believe it was unloaded). The statute does not make plain that such unintentional shootings are "volitional" criminal acts and resort to the legislative record was thus in order.

Because the Illinois Supreme Court authoritatively construed a federal statute in a manner that employs rules of statutory construction at odds with those employed by the circuits, *see* Pet. 32-33, this case presents an issue of great national importance and one in which the circuits are in conflict. The case merits this Court's exercise of its certiorari discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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